Petition

81-382

NO. ———

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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

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IGNACIO BUCIO-REYES,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

———

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

———

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QUESTIONS PRESENTED

Should the Sixth Circuit have affirmed the District Court which accepted a nolo contendere plea under the circumstances of this case when:

A. The Court did not inquire into defendant's statement, made through an interpreter, that "he thinks he is innocent";

B. When the Court was therefore unaware of facts which an inquiry would have revealed and which were not before the Court, but which would have sustained appellant's statement of innocence since they would support the legality of his status?

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Ignacio Bucio-Reyes prays that a Writ of Certiorari issue to review judgment of the United States Court of Appeals for the Sixth Circuit entered June 11, 1981, and by subsequent Order issued July 28, 1981, in a proceeding entitled United States of America, Plaintiff-Appellee vs. Ignacio Bucio-Reyes, Defendant-Appellant, appealed from the District Court for the Southern District of Ohio, Western Division, at Dayton.

OPINION BELOW

The Opinion and subsequent Order of the United States Court of Appeals for the Sixth Circuit are included in the Appendix herewith. It affirms the Order of the District Court on the grounds that it had "no power over our emigration laws" although the Court found Petitioner to be "a decent hard working, good human being" and "the kind of person I would be proud to have as a fellow American citizen".

JURISDICTION

The judgment of the Court of Appeals was entered June 11, 1981 and the Final Order refusing to reopen and reconsider was issued July 28, 1981, said Order containing the express statement that "motion to stay mandate will be considered if appellant desires to petition the Supreme Court for a writ of certiorari". The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1) and 28 U.S.C. Supreme Court of the United States Revised Rules 21, 22 and 23.

STATEMENT OF FACTS

Petitioner is a Mexican national, residing in this country seven years. A respected business man with absolutely no legal blemish on his record, he now faces deportation because the Sixth Circuit affirmed a District Court's order, although the District Court, by certain procedure, cut off the Petitioner's explanation and defense. Petitioner assumed his position here was legal since he had received a Permanent Resident status, commonly called a Green Card, from an Immigration Officer at the airport in Chicago upon Petitioner's presenting clearance from the Immigration Officer in Texas.

Petitioner was so sure of the legality of his status that he filed application for United States citizenship in Ohio and presented himself and his papers accordingly with full confidence. It was only then that the Immigration Service in Ohio challenged his Permanent Residence status going back to statements antedating the issuance of the Green Card, and charging failure to disclose prior deportation order. To this charge the Petitioner would have answered, were it not for certain action by the District Court, that he understood the examining agent in Texas to have told him that disclosure of these prior incidents need not be declared since he had voluntarily departed and therefore he was not officially deported.

The action of the District Court, which was affirmed by the Sixth Circuit and therefore is the basis of this Petition, was accepting a Nolo Contendere plea under the circumstances of this case and shutting off Petitioner's explanation.

DECISION OF COURT OF APPEALS

In its Order of June 11, 1981, the Sixth Circuit found that the District Court need make no further inquiry into the basis of Petitioner's thoughts before accepting a Nolo Contendere plea even though Petitioner stated, through an interpreter, that "He thinks he is innocent". In its subsequent Order of July 28, 1981, the Sixth Circuit again affirmed the Order of the District Court ordering deportation, adding:

> "The motion to stay the mandate will be considered if appellant desires to petition the Supreme Court for a writ of certiorari."

REASONS FOR GRANTING THE WRIT

A constitutional right has been violated when:

A. The Court did not inquire into Petitioner's statement, made through an interpreter, that "He thinks he is innocent";

B. When the Court was therefore unaware of facts which an inquiry would have revealed and which were not before the Court, but which would have sustained Petitioner's statement of innocence since they would support the legality of his status.

Rule 11 (b) provides that a plea of Nolo Contendere shall be accepted by the Court only after due consideration of the views of the parties. A special factor entered this case requiring such due consideration, when the interpreter stated to the court, in the course of the court's inquiry, "He thinks he is innocent". (Trans. 16, L. 12; 4a). This statement was clearly an expression of a view requiring due consideration and no such consideration was given. Instead, the court replied: "Okay. But the question is – and we will get to that in a minute – has anybody told him that he had to prove in court that he was innocent?" (Trans. 16, L. 13-16; 4a).

This amounts to ignoring a fundamental bar to a nolo contendere plea and turning it off into a matter of a technicality of evidence. The court made no inquiry then or later as to why the Appellant throught he was innocent but merely inquired if anyone had told him of the burden of proof requirement. The language barrier which is evident throughout this case continued to be a confusing factor in the whole colloquy because four pages later shows (Trans. 20, L. 23-25; 5a) the court is still asking

the prosecutor: "Mr. Torres, you have been talking to Mr. Bucio-Reyes for the last fifteen minutes. Do you think he understands everything I have said to him?"

Under these circumstances Petitioner submits that the acceptance of a nolo contendere plea was improper because such a plea cuts off the only defense this Petitioner had, a defense which only he could properly explain, namely, his justified belief that his status was legal since he held a Green Card from the Immigration and Naturalization Service, one that had been issued him with the understanding that his past improper entries were not held against him because he had departed voluntarily. His only guilt, therefore, was relying on the Immigration and Naturalization Service, whereas, a nolo contendere plea "is tantamount to an admission of guilt for the purpose of the case." *United States* v. *Washington,* (CA 3, Pa.) 341 F.2d 277, 9 ALR 3d 448, Cert. Den. 382 U.S. 850, 14 L.Ed.2d 85, 86 S.Ct. 96, Reh. Den. 382 U.S. 933, 15 L.Ed.2d 346, 86 S.Ct. 317.

Moreover, there was no showing on record that there was any persuasive reason why a plea of nolo contendere would be appropriate. *United States* v. *Gratton,* (CA 7, Ill.) 525 F.2d 116. To the contrary, Petitioner was precluded from presenting his sole defense — that he had relied on a statement from a Government agency and that that agency had reversed its position and rescinded its permission.

There is no element of deception in this case nor any indication of a guilty conscience. Petitioner was neither secretive nor surreptitious in any of his actions. Each year he registered as a Resident Alien as required by law. In applying for citizenship he knowingly opened up his record for review since he was certain his status was completely legal. With such a background he was entitled

to something more than having a legal assumption of guilt forced upon him by a nolo contendere plea. This is especially true since he drew the court's attention as to his "view" by the declaration that he was innocent, a view that the court chose to ignore, thus stopping the Appellant's mouth from presenting his crucial defense.

Petitioner therefore respectfully requests this Court to find that he was deprived of fundamental rights in the Deportation Hearing, rights guaranteed by the *Sixth Amendment*. Petitioner further respectfully draws this Court's attention to the statement of the District Court which may be he appropriate summary and the crux herein:

> "THE COURT: Tell him that the report says that he is a decent, hard working, good human being. Tell him that based on what I read in this report, he would be the kind of person that I would be proud to have as a fellow American citizen. But tell him that I have no power over our emigration laws and I simply am not able to allow him to stay in the country. Ask him if he understands that . . ." (Trans. 26, L. 24, 25; 6a; Trans. 27, L. 1-6; 6a)

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 80-3744

UNITED STATES OF AMERICA
Plaintiff-Appellee

v.

IGNACIO BUCIO-REYES
Defendant-Appellant

ORDER

(Filed July 28, 1981)

Before WEICK, ENGEL and JONES, Circuit Judges.

Upon consideration, it is ordered that the motion filed by appellant to reopen and reconsider the order of this court entered June 11, 1981, affirming the order of deportation of the district court be and it is hereby denied.

The motion to stay the mandate will be considered if appellant desires to petition the Supreme Court for a writ of certiorari.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 80-3744

UNITED STATES OF AMERICA
Plaintiff-Appellee

v.

IGNACIO BUCIO-REYES
Defendant-Appellant

ORDER

(Filed June 11, 1981)

Before WEICK, ENGEL and JONES, Circuit Judges.

This is an appeal from a judgment of the district court finding the defendant-appellant guilty as charged on a Nolo Contendere plea to an indictment charging him with the offense of Unlawful Re-Entry of a Deported Alien in violation of 8 U. S. C. 1236. He was sentenced to two years imprisonment, "Sentence being suspended on condition that defendant volunteers to leave the United States of America by January 1, 1981." The court later sustained a motion for a stay pending appeal.

Shortly after his indictment, he appeared in court and originally entered a not guilty plea and was represented by counsel. Later represented by the same counsel and an interpreter friend, he changed his plea to Nolo Contendere. Before accepting the Nolo Contendere plea, the court conducted an extensive examination of appellant's knowledge

of the various consequences of the Nolo plea and of the voluntariness of his plea. In his brief, appellant admits that the court's examination fully complied with the requirements of Fed. R. Crim. P. 11(c) and (4). In the colloque which occurred during the examination by the court, the interpreted stated "He thinks he is innocent." The court made no further inquiry into the basis of his thoughts and, in our opinion, the court was not required to make further inquiry.

In *North Carolina* v. *Alford*, 400 U. S. 25 (1970) on page 36, the court stated in a footnote:

> Throughout its history, that is, the plea of *nolo contendere* has been viewed not as an express admission of guilt but as a consent by the defendant that he may be punished as if he were guilty and a prayer for leniency. Fed. Rule Crim. Proc. 11 preserves this distinction in its requirement that a court cannot accept a guilty plea "unless it is satisfied that there is a factual basis for the plea"; there is no similar requirement for pleas of *nolo contendere*, since it was thought desirable to permit defendants to plead *nolo* without making any inquiry into their actual guilt. See Notes of Advisory Committee to Rule 11.

Tempo Trucking & Transfer Corp. v. *Dickson*, 405 Fed. Supp. 506, 516 (E. D. New York); *United States* v. *Wolfson*, 52 F. R. D. 170, 175 (D. Del. 1975), Rule 11 F. R. Crim. P., 1966 Notes of Advisory Committee on Criminal Rules, 18 U. S. C.

The judgment of the district court is affirmed.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

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[16] (Mr. Torres interpreted to Defendant.)

THE DEFENDANT: Yes.

THE COURT: Has anybody told you that you had to prove that you were innocent in this case?

(Mr. Torres interpreted to Defendant.)

THE DEFENDANT: I feel, you know, I feel –

MR. TORRES: No. He says it was his own to say it, nobody told him.

THE COURT: Nobody told him he had to prove that he was innocent?

MR. TORRES: No. He himself decided to say that he was innocent. He thinks he was innocent.

THE COURT: Okay. But the question is – and we will get to that point in a minute – has anybody told him that he had to prove in court that he was innocent?

MR. TORRES: No, nobody told him. That's what he told me.

THE COURT: Do you understand that you have the right to plead not guilty and ask Mr. Hogan to issue court orders or subpoenas that would being (*sic*) into court anyone who would testify for you as a witness, and that this would be done free of charge?

(Mr. Torres interpreted to Defendant.)

THE DEFENDANT: Yes, I understand.

* * *

[20] (Mr. Torres interpreted to Defendant.)

THE DEFENDANT: It was cough medicine.

THE COURT: Do you fully understand everything that we have gone over?

(Mr. Torres interpreted to Defendant.)

THE DEFENDANT: Yes, I understand.

THE COURT: Do you have any questions on anything that we have discussed?

(Mr. Torres interpreted to Defendant.)

THE DEFENDANT: Well, the only thing –

(Mr. Torres interpreted to Defendant.)

MR. HOGAN: Excuse me. The Court wants to know what he is saying.

MR. TORRES: I'm trying to get a complete sentence so I can say.

THE COURT: My question to him was, does he have any questions to ask me.

THE DEFENDANT: No, no. I don't have any questions.

THE COURT: Mr. Torres, you have been talking to Mr. Bucio-Reyes for the last fifteen minutes. Do you think he understands everything that I have said to him?

* * *

[26] (Mr. Celestino interpreted to Defendant.)

THE COURT: All right. Why not tell the interpreter what it is you wish to tell me, sir.

MR. CELESTINO: He wishes to say that every since he has been admitted in the United States he has been a decent person, a hard worker, has never been in any problems with the law, not reported for taxes, and abided by all the laws of the United States. I have given more to the country than the country has actually given to me. And I am certain that I can give it more, that – in my mind, what has happened was a simple thing, not a crime at all. Politics, people with big names, like, create wars, cause problems among men, and they are judged worldly. I have not done any of these things.

THE COURT: Anything else, sir?

MR. CELESTINO: That is all.

THE COURT: Your name, sir?

MR. CELESTINO: My name is Pio Celestino.

THE COURT: Mr. Celestino, tell Mr. Bucio-Reyes that I have read the probation report very carefully. Tell him that, and then I will tell you the rest.

(Mr. Celestino interpreted to Defendant.)

THE COURT: Tell him that the report says that he is a decent, hard working, good human being. Tell [27] him that based on what I read in this report, he would be the kind of person that I would be proud to have as a fellow American citizen. But tell him that I have no power over our emigration laws and I simply am not able to allow him to stay in the country. Ask him if he understands that.

THE DEFENDANT: Yes.

THE COURT: Do you understand, sir?

THE DEFENDANT: Yes.

THE COURT: Tell him that I hope that he and Mr.

Hogan are able to work with the emigration people so that he can come back to this country legally. Tell him that, if you would.

(Mr. Celestino interpreted to Defendant.)

THE COURT: Do you understand that, sir?

THE DEFENDANT: Yes.

THE COURT: Tell him that at this point I have no choice but to proceed with the disposition of the case.

(Mr. Celestino interpreted to Defendant.)

THE COURT: And ask him, if you would, if there is anything further that he wishes to say.

THE DEFENDANT: No.

* * *